IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.2937 OF 2006

The State of Maharashtra ...Applicant
vs.
Hanmant Prabhakar Waidande & ors. ...Respondents

Mr.S.R.Borulkar, P.P. with Mr.S.R.Shinde, A.P.P. for State
None for the Respondents.

CORAM: A.S.OKA,J.
DATE ON WHICH SUBMISSIONS WERE HEARD: OCTOBER 11, 2006
DATE ON WHICH THE JUDGMENT IS PRONOUNCED:NOVEMBER 17,2006.

ORAL JUDGMENT:

1. This is an Application for leave to prefer an Appeal under section 378 of the Code of Criminal Procedure, 1973 against the order dated 12th April 2005 passed by the learned Judicial Magistrate First Class, Pandharpur. By the said order, the Respondents have been acquitted of offences under section 324, 323, 504 and 506 of the Indian Penal Code. This Application has been filed on 2nd August 2006.

2. Section 378 of the Code of Criminal Procedure, 1973 has been amended by the Code of Criminal Procedure (Amendment) Act, 2005 (hereinafter referred to as the Amendment Act). Sub section 2 of section 1 of the Amendment Act provides that the same shall come into force on such date as the Central Government may, by notification in official gazette, appoint. A notification dated 21st June 2006 has been published by the Central Government in the gazette of the same date by which the provisions of the Amendment Act except few sections named therein have been brought into force. By the said notification, 23rd June 2006 is the date fixed for bringing into force the Amendment Act.

3. Sub section 1 of section 378 of the said Code has been substituted by section 32 of the Amendment Act. The amended sub section 1 of section 378 reads thus:

"(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub section (3) and (5), -

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision."

4. Section 32 of the Amendment Act which incorporates the aforesaid amendment has been brought into force on 23rd June 2006. In view of the substitution of sub section 1 of section 378, in case of an order of acquittal passed by the Magistrate in respect of a cognizable and non bailable offence, the District Magistrate may direct the Public Prosecutor to present an Appeal to the court of Session for challenging the

said order. Thus, in view of clause (a) of sub section 1 of section 378, an Appeal preferred by the State against the order of acquittal passed by the Magistrate in respect of a cognizable and non-bailable offence will have to be filed in the Court of Session. Such Appeal can be preferred by the Public Prosecutor on the direction of the District Magistrate. Clause (b) of sub section 1 of section 378 as amended provides that in a case of original or appellate order of acquittal passed by any Court other than High Court (not being an order under clause (a)) or an order of acquittal passed by the court of Session in revision, the State Government can prefer an Appeal to this Court. Such Appeal can be preferred by the Public Prosecutor on the direction of the State Government. Thus, in case of an order of acquittal passed by the Magistrate in respect of a cognizable and non-bailable offence, the forum for filing an Appeal against acquittal by the State Government is the court of Session. It is pertinent to note that no amendment has been carried out to sub section 4 of section 378 and therefore, in case of an order of acquittal in a private complaint by a Court of Magistrate for cognizable and non bailable offence, for an Appeal against acquittal preferred by the complainant, the forum of Appeal will continue to be High Court.

5. So far as the present Application for grant of leave to Appeal is concerned, the order of acquittal has been passed by the learned Judicial Magistrate (First Class) in respect of a cognizable and non-bailable offence. Thus, after 23rd June

2006, the present Application could not have been filed in this Court as an Appeal against order of acquittal will lie to the appropriate court of session. It was sought to be contended that in cases of orders of acquittal covered by Clause (a) of sub section 1 of section 378 (as amended) which are passed on or before 22nd June 2006, the forum for preferring an Appeal against acquittal by the State Government will be as per the unamended Act. There is no merit in the said contention. By the Amendment Act, right of Appeal is not taken away. It can be said that the right to prefer an Appeal was vested when the prosecution was lodged. By the Amendment Act, the vested right is not taken away and with effect from 23rd June 2006, only the forum of Appeal has undergone a change.

6. At this stage, it will be necessary to refer to the decision of the Apex Court in Case of Maria Cristina De Souza Sodder and others Vs. Amria Zurana Pereira Pinto and others [(1979 1 S.C.C. page 92). The said case before the Apex Court arose out of a suit filed in the year 1960 under the Portuguese Civil Procedure Code by the first and Second Respondents against the Appellants. The suit was decreed in favour of the Respondents in the year 1968. The Appellants preferred an Appeal to the Court of Judicial Commissioner against the decree. During the pendency of the suit, the Code of Civil Procedure, 1908 with the repeal of the Portuguese Civil Code was extended to the territories of Goa, Daman and Diu in the year 1966. Simultaneously, Goa, Daman and Diu Civil Courts Act, 1960 came into force. Under the said Act,

an Appeal against the decree was provided before the Court of Judicial Commissioner. An objection was raised that the Appeal was not preferred in proper court, by pointing out that under the provisions of Portuguese Code, the Appeal was required to be filed in the Court which decided the suit. The contention was that since the right of Appeal was conferred by the Portuguese Code, even the forum of Appeal was also governed by the Portuguese Code. The Apex Court dealt with the said contention as under :

"5...It is no doubt well settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the lis is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof. This position has been made clear by clauses (b) and (c) of the proviso to section 4 of the Central Act XXX of 1965 which substantially correspond to clauses (c) and (e) of Section 6 of the General Clauses Act, 1897. This position has also been settled by the decisions of the Privy Council and this Court (vide The Colonial Sugar Refining Company Ltd. V. Irving and Garikapatti Veerya V. N. Subbiah Choudhury but the forum where such appeal can be lodged is indubitably a procedural matter and, therefore, the appeal, the right to which has arisen under a repealed Act, will

have to be lodged in a forum provided for by the repealing Act. That the forum of appeal, and also the limitation for it, are matters pertaining to procedural law will be clear from the following passage appearing at page 462 of Salmond's Jurisprudence (12th Edn.) "

. "Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfil their functions."

. It is true that under clause (c) of the proviso to Section 4 of Central act XXX of 1965 (which corresponds to Section 6 (e) of the Central Clauses Act, 1897) it is provided that a remedy or legal proceeding in respect of a vested right like a right to an appeal may be instituted, continued or enforced as if this Act (meaning the repealing Act) had not been passed. But this provision merely saves the remedy or legal proceeding in respect of such vested right which it is open to the litigant to adopt notwithstanding the repeal but this provision has nothing to do with the

> forum where the remedy or legal proceeding has to be pursued. If the repealing Act provides new forum where the remedy or the legal proceeding in respect of such vested right can be pursued after the repeal, the forum must be as provided in the repealing Act...."

7. Therefore, in view of what is held by the Apex Court, the Appeals against acquittal filed by the State on or after 23rd June 2006 against the orders covered by Clause (a) of sub section 1 of section 378 which are passed before 23rd June 2006 will lie to the court of Sessions. The reason being that by the Amendment to the said Code, the forum of Appeal has undergone a change. It must be noted here that as per clause (a) of sub section 1 of section 378 (as amended), the District Magistrate has been empowered to direct the Public Prosecutor to present an Appeal to the Court of Session.

8. Thus, in this case only option open is to return this Application for grant of leave to the Public Prosecutor for presenting the same to the appropriate Sessions court in accordance with law.

9. Accordingly, office is directed to return the papers of this Criminal Application along with certified copies, if any, to the Public Prosecutor.

JUDGE